Supreme Court, U.S.
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No. 95-1378

In The

Supreme Court of the United States

October Term, 1995

J. RICHARD FURRER and MARGARET L. FURRER,

Petitioners,

vs.

DONALD F. BROWN, DOROTHY J. BROWN, LOUIS W. FAGAS, GERALDINE J. FAGAS and SHELL OIL COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Question Presented as outlined by Petitioners is whether the provisions of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(a)(1)(B), authorize a private party to bring suit for recovery of cleanup costs, whether such costs be called "restitution" or "damages." The question is identical to that unanimously decided by this Court on March 19, 1996, in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135.

CLARIFICATION OF PRELIMINARY MATTERS

Pursuant to Rule 15 of the Rules of the Supreme Court of the United States[1], Respondent Donald F. Brown and Dorothy J. Brown file this Brief In Opposition to Petition For Certiorari filed by Petitioners J. Richard Furrer and Margaret L. Furrer.[2] Respondents Brown believe that the caption as filed in the "corrected Petition For A Writ of Certiorari," filed on February 28, 1996 according to the Proof of Service, as well as the caption to this Reply, correctly lists all of the parties to the proceeding as allowed in Rule 14(b).[3] Petitioner has correctly outlined the opinions below, the jurisdiction of this Court to hear the Petition, and the statutory provisions involved.

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[1] Hereafter, the Rules of this Court will simply be referred to as "rule" followed by the Rule number.

[2] The Petition For A Writ of Certiorari filed by the Furrers in this Court shall be referred to for simplicity as "Pet." followed by the relevant page number of the Petition.

[3] There is some question as to whether the Petition For A Writ of Certiorari was timely filed. The original Petition was apparently received by the Court on January 16, 1996, although no docketing fee accompanied the Petition as required by Rules 12.1 and 38, and the Petition did not technically comply with Rule 14. A "corrected Petition" was served by mail on Respondents Brown on February 28, 1996, and the case was docketed by the Court on or about that latter date. The ninetieth day following the denial of the Petition For Rehearing to the Eighth Circuit Court of Appeals expired on January 28, 1996. The question is, however, moot in light of the substantive reasons for denying certiorari as outlined in this Brief.

REASONS FOR DENYING THE PETITION FOR WRIT

The Petitioners have not invoked any of the reasons for this Court exercising its discretion to grant certiorari as required by Rule 10. If any such reasons existed on the date of filing, those reasons have been rendered moot by this Court's unanimous opinion in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135, decided March 19, 1996.

Petitioners have also not accurately nor concisely stated the case as it appeared in the Eighth Circuit and the District Court for the Eastern District of Missouri below. The case was disposed of on the pleadings, so the parties are bound by the pleadings of Petitioner for the purpose of review. However, certain of Petitioners statements go beyond what was pled by them below.

Petitioners assert at Pet. 3 that:

> The Furrers and the Browns however, did not discuss the tanks during the negotiations for the acquisition. Neither the Furrers nor their tenant ever used the underground gasoline tanks.

The first of these propositions was not pled by Petitioners. Since it is not germane to the decisions of the lower courts, it is inapposite to the issues presented here.[4]

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[4] While Respondents Brown disagree with these facts, and point them out as requested in Rule 15(a), the facts are not ultimately dispositive of the denial of the Petition, and as a result Respondents do not burden the Court by attaching the original Complaint as an appendix.

The second proposition, while pled, is one about which the parties are in dispute, and one about which Respondents Brown believe Petitioners have contradicted themselves in subsequent pleadings and discovery. However, since again it is not the basis for the rulings of the courts below, nor crucial to the Petitioners' case, it is inapposite to the issues presented. While Respondents Brown disagree with the other facts as outlined, they were pled and were considered in the decisions below.

At Pet. 8 the Petitioners assert:

> Because the district court dismissed the case on the basis that RCRA does not provide the right to restitution, the issue of whether an "imminent and substantial endangerment" must exist was not decided either [sic] the district or appellate courts.

This statement is in direct contrast to the ruling of the District Court as set out at A-28 of the Appendix filed by Petitioner:

> Finally, in order to prevail on their claim under RCRA, the plaintiffs must plead and prove that the leaking petroleum presents "an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B). **Plaintiffs make no such allegation here.** Further, as the plaintiffs have completely cured the contamination at issue in this case **it will be impossible for them to prove** the petroleum contamination currently presents an imminent and substantial endangerment to the health or the environment.

(emphasis added). While the Eighth Circuit acknowledged this conclusion of the District Court, it did not

decide the particular issue. See, Footnote 6, A-5, Opinion of the Eighth Circuit.

Finally, Petitioners try to avoid the issue by suggesting that there is some substantive difference between whether they are asking this Court to decide whether there is an implied cause of action under RCRA, or whether the remedy of restitution is available to a private citizen under RCRA. The answer to both questions has been put to rest by this Court on March 19, 1996, in the Court's decision in ***Meghrig v. KFC Western, Inc.***, No. 95-83, ___ U.S. ___, 64 U.S.L.W. 4135. In that case, this Court addressed the identical issues and unanimously held:

> It is apparent from the two remedies described in § 6972(a) that RCRA's citizen suit provision is not directed at providing compensation for past cleanup efforts. Under a plain reading of this remedial scheme, a private citizen suing under § 6972(a)(1)(B) could seek a mandatory injunction, . . . or a prohibitory injunction, ... Neither remedy, however, is susceptible of the interpretation adopted by the Ninth Circuit, as neither contemplates the award of past cleanup costs, whether these are denominated "damages" or "equitable restitution."

Meghrig, ___ U.S. at ___, 64 U.S.L.W. at 4136-4137. It seems inescapable that ***Meghrig*** disposes of the issue presented in this case with certitude and finality. The Petitioners seek to recover for costs of cleanup which they admit they have already incurred at the request of the Missouri Department of Natural Resources. See, Pet. 3, and A-2 Opinion of the Eighth Circuit. The case is

identical to ***Meghrig*** in spite of Petitioners' attempts to distinguish the two. This Court's unanimous opinion in ***Meghrig*** does not admit exception or interpretation; it could not have been more definitive. The Petition For A Writ of Certiorari here should be denied.

Respectfully submitted,

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